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In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES DEPARTMENT OF STATE, PETITIONER

v.

MICHAEL D. RAY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

KENNETH W. STARR
Solicitor General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

STUART M. GERSON
Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

LEONARD SCHAITMAN
BRUCE G. FORREST
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTIONS PRESENTED

In this case under the Freedom of Information Act (FOIA), 5 U.S.C. 552, respondents seek to obtain names and other information that would identify Haitian citizens who were interviewed, on a confidential basis, by State Department personnel in Haiti in the course of monitoring the Haitian Government's compliance with its agreement not to persecute persons returned to that country by the United States. The questions presented are:

1. Whether the names and other information identifying the individual Haitian citizens who consented to be interviewed by State Department personnel are protected against mandatory disclosure by FOIA Exemption 6, which applies to matters "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6).

2. Whether the district court erred in refusing to consider the merits of the State Department's submission that the names and other identifying information also are protected by FOIA Exemptions 1 (classified information) and 7(C) and 7(D) (law enforcement information), because the State Department did not classify the information and invoke Exemptions 1, 7(C) and 7(D) until after the district court had denied the Department's motion for summary judgment based on Exemption 6 and ordered it to disclose the identities of the interviewees.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Solicitor General, on behalf of the United States Department of State, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-24a) is reported at 908 F.2d 1549. The orders of the district court (App., *infra*, 25a-30a, 31a-33a) are reported at 725 F.Supp. 502 and 505.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1990, and a petition for rehearing was denied on October 12, 1990. App., *infra*, 34a-35a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Freedom of Information Act, 5 U.S.C. 552, are reproduced at App., *infra*, 38a-39a.

STATEMENT

1.a. Respondent Michael Ray, a lawyer, brought this action under the Freedom of Information Act (FOIA), 5 U.S.C. 552, on his own behalf and on behalf of three Haitian nationals seeking political asylum in the United States. Second Amended Complaint ¶¶ 3, 4 (R1:36).[1] Respondents had filed FOIA requests with the Department of State seeking records of investigatory trips to Haiti made by federal personnel. *Id.* ¶ 41. The State Department released 25 documents, but deleted from 17 of those documents names and other information that would identify individual Haitians who had been interviewed by State Department personnel. The State Department initially withheld that information under Exemption 6, 5 U.S.C. 552(b)(6), which provides that the FOIA "does not apply to matters that are * * * personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." App., *infra*, 26a.

The State Department filed a motion for summary judgment on the Exemption 6 claim, supported by the declaration of John Eaves, the Acting Deputy Director of the Office of Mandatory Review of the State Department's Classification and Declassification Center. R3:52, Exh. A. ¶ 1. Mr. Eaves explained that the 17 documents are reports from Haiti of confidential interviews by State Department personnel of Haitian nationals who had been returned to Haiti following unsuccessful attempts to enter the United States without documentation. The interviews were conducted to determine whether the individuals had been mistreated by Haitian authorities upon their return. *Id.* ¶¶ 8, 10. Respondents alleged that they needed the information for use in ongoing deportation and asylum proceedings, in order to assist them in showing that *they* would be subject to persecution if returned to Haiti. App., *infra*, 3a-4a. Mr. Eaves explained that the State Department had released the substance of the reports in their entirety and that the names and other identifying information were withheld "to protect the privacy of Haitians who consented to interviews by Embassy officers" (Eaves Decl. ¶ 8):

> While no evidence of harassment or other ill treatment of the returned Haitians was reported, those who were interviewed consented to the procedures with the understanding that their conversations with Embassy officers would be conducted under conditions of privacy and confidentiality. To disclose the identities of these individuals would not only betray their trust in our discretion, it would also subject them or their families to possible embarrassment in their social and community relationships. This would be a clearly unwarranted invasion of the privacy of the individuals concerned.

b. On March 3, 1989, the district court issued a memorandum order on pending motions. That order, *inter alia*, rejected the State Department's submission that the identities of the interviewees were properly withheld under FOIA Exemption 6. App., *infra*, 25a-30a. The court noted that in determining whether disclosure would result in a clearly unwarranted invasion of personal privacy, it was required to "employ a balancing test, weighing an individual's right of privacy against the public right to disclosure of government information." *Id.* at 28a. Treating "[t]he promise of confidentiality by the State [Department]" as "only one factor to be considered," the court found the privacy interests at stake in this case to be "de minimis and little more than speculation." *Id.* at 29a. On the other side of the balance, the court found that "this country's immigration policy supports a finding

[1] "R1" refers to the first volume of the record certified by the district court to the court of appeals. "36" refers to the document number provided by the district court.

that the public has a legitimate interest in the safe relocation of returned Haitians." *Ibid.* Without explaining how this supports public disclosure of information obtained on a confidential basis to assure a candid assessment of Haiti's conduct, the court concluded that the balance "tilts" in favor of public disclosure of the names and other information identifying the individual Haitians who had consented to be interviewed. *Ibid.* The court therefore ordered the State Department to release that information within 15 days, although it withheld entry of final judgment until after expiration of the 15-day period. *Ibid.*[2]

2.a. After the district court ordered release of the names, the State Department immediately instituted a review of the sensitive nature of that information and the consequences of public disclosure. See page 26, *infra*. On March 17, 1989, the State Department moved for reconsideration,[3] arguing that the identities of the Haitian nationals are protected not only by FOIA Exemption 6, but also by Exemptions 1, 7(C) and 7(D), 5 U.S.C. 552(b)(1), (7)(C) and 7(D). Those exemptions provide that FOIA does not apply, respectively, to matters that are properly classified pursuant to Execu-

[2] Respondents also sought to obtain an alleged list of 600 individuals who had been returned to Haiti and had not been persecuted. The State Department and Immigration and Naturalization Service concluded that no such list existed, and both courts below found their searches adequate. *Id.* at 16a-20a, 26a-27a. In addition, respondents requested the district court to certify a class of all black Haitian citizens in exclusion and deportation proceedings who would present asylum claims and to enjoin those proceedings until six months after respondents obtained the information they sought under the FOIA. The district court, affirmed by the court of appeals, refused to certify a class and dismissed respondents' non-FOIA claims. App., *infra*, 5a, 15a-16a, 21a-24a, 29a n.3, 36a-37a. Those issues are not involved here.

[3] Although the district court had withheld entry of final judgment, App., *infra*, 29a, the motion was styled a Motion to Alter or Amend Judgment and was filed pursuant to Fed. R. Civ. P. 59(e). R4:86, at p. 1.

tive Order of the President or to law enforcement information the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy or to disclose a confidential source.

The motion for reconsideration was supported by the declaration of Richard H. Melton, the Deputy Assistant Secretary of State for Inter-American Affairs. R4:88. He stated that on September 23, 1981, the United States, pursuant to Executive Order of the President, had entered into an agreement with the Government of Haiti to reduce illegal migration of Haitians to the United States. *Id.* ¶¶ 3, 4; see Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (1981). He continued (Melton Decl. ¶ 3):

> That agreement provided for various cooperative law enforcement measures, including the interdiction by U.S. Government authorities of Haitian flag vessels on the high seas, inquiries regarding the status of those on board, and the return of the vessels and persons aboard to Haiti if a violation of U.S. or Haitian law is discovered. The agreement included an undertaking by the Government of Haiti not to prosecute for illegal departure any of the returnees who are not traffickers. The U.S. Government stated its intention in the agreement not to return any Haitian migrants "whom the United States authorities determine to qualify for refugee status." [4]

Mr. Melton also explained why the interviews "were conducted with the clear understanding that they would be held confidential" (Melton Decl. ¶ 7; see *id.* ¶ 10):

> If Haitians had been aware that their names and interview statements could be made public and

[4] The declaration (¶ 7) described the interview process: When a vessel was interdicted and it was ascertained that the persons on board did not have a bona fide claim to refugee status, the vessel and its passengers were returned to Haiti. Upon arrival at Port-au-Prince, a U.S. Embassy official obtained the names and addresses of all returnees. State Department personnel then conducted a follow-up interview of a representative sample of the returnees, usually about six months later. Approximately 27% of the returnees were located and agreed to be interviewed.

> might be used in political asylum proceedings, either on behalf of or against fellow Haitians, the interviewees might have been far less candid in nature. Had the U.S. government not been able to assure confidentiality of the names of interviewees, the United States would have been severely handicapped in its ability to obtain the information necessary to assess the success of its agreement with Haiti and the interdiction program.

More generally, Mr. Melton explained that without the "essential trust" that the United States will "protect the identity of sources of information, * * * [o]ther Haitians or third country nationals on whom the United States relies for candid and frank assessments of internal conditions would be reluctant to believe in a U.S. promise of confidentiality." *Id.*, ¶ 8. For this reason, he stated (*id.* ¶ 9), the documents were being reviewed for classification pursuant to Executive Order No. 12,356, 47 Fed. Reg. 14,874 (1982). See *id* § 1.1(c) (documents protected pending classification review).

b. On March 27, 1989, the State Department informed the court in a supplemental memorandum that, following the review instituted by Deputy Assistant Secretary Melton, the identities of the Haitian nationals had been classified. R4:93. That memorandum was accompanied by the declaration of Pratt Byrd, the Acting Deputy Director of the Office of Mandatory Review in the State Department's Classification and Declassification Center. R4:95. Mr. Byrd explained that the interview reports are proper subjects of classification because they constitute information concerning "foreign relations or foreign activities of the United States" and "confidential source[s]," and that the names had been classified because their release "reasonably could be expected to cause damage to the national security of the United States." *Id.* ¶ 8 (quoting Exec. Order No. 12,356, §§ 1.3(a)(5) and (9), 1.3(b)).

In elaborating upon the foreign relations considerations supporting classification, Mr. Byrd explained that release of the identities of the Haitian nationals who co-

operated with the United States would make other foreign nationals in similar circumstances reluctant to speak with U.S. Embassy officials, and he identified a number of adverse consequences that would follow. First, the most effective way of ensuring that foreign governments abide by their agreements not to persecute persons who are interdicted and returned by the United States would be undermined. Byrd Decl. ¶ 11. Second, the United States monitors the treatment of persons who attempt to leave their country in order to assure humanitarian treatment of migrants and refugees, and "[o]ur inability to preserve confidentiality of sources who provide information on human rights conditions would jeopardize the government's ability to monitor human rights conditions under the Foreign Assistance Act of 1961, as amended [22 U.S.C. 2151n, 2304]." *Id.* ¶¶ 12, 13.

Third, a loss of confidentiality would undermine the usefulness of such interviews in enforcing United States laws, including Sections 207 and 208 of the Immigration and Nationality Act, 8 U.S.C. 1157 and 1158, which require the United States to assess claims or fears of persecution in connection with applications for political asylum and refugee admission. Byrd Decl. ¶ 13. Finally, the overall credibility of the United States in maintaining confidentiality would be damaged by release of the names, thereby "impairing the government's ability to obtain information about conditions and events in foreign countries generally, and * * * inhibiting the government's ability to anticipate and evaluate accurately changes in the local political scene which may have international ramifications." *Id.* ¶ 14.

c. The district court chose not to address the merits of the State Department's submission. Instead, in a brief order, the court held that the State Department had waived its Exemption 1 and 7 claims by failing to raise them until after the court had ordered disclosure. App., *infra*, 31a-33a.

3. a. The court of appeals affirmed. App., *infra*, 1a-24a. In addressing the Exemption 6 issue, *id.* at 6a-13a, the court thought it "important to candidly acknowledge that it appears that [respondents] seek the redacted information so that they can contact directly the Haitians who were interviewed by American officials and question them about how they are treated by the Haitian government since attempting to flee to the United States." *Id.* at 7a. "In light of that fact," the court found it "difficult to characterize this invasion of the Haitian returnees' privacy to be no more than de minimis," as the district court had done. *Ibid.* The court also noted that "the returnees were promised confidentiality before they talked with U.S. government officials," a factor that, although it does not compel withholding, "adds weight to the privacy interests at stake." *Id.* at 7a. For these reasons, the court of appeals "beg[a]n the balancing process by acknowledging that there are significant privacy interests at stake here." *Id.* at 8a.

Nevertheless, while regarding it as a "close question," the court held that disclosure was mandated, because it believed the significant privacy interests were outweighed by a legitimate public interest in disclosure. The court agreed with the State Department that respondents' desire to use the information in resisting deportation did not justify disclosure, because the goal of FOIA is "'to open agency action to the light of public scrutiny,'" not to further "private purposes." App., *infra*, 8a-9a (quoting *Department of Air Force* v. *Rose*, 425 U.S. 352, 361 (1976)). But the court noted that respondents "also seek the information in order to learn whether the United States government is adequately monitoring Haiti's compliance with its obligation not to persecute returnees and to learn whether our government is honest to the public about Haiti's treatment of returnees." App., *infra*, 9a. In particular, it noted that respondents "dispute the view expressed publicly by some government officials that Haiti is adhering to its promise

not to punish returnees, and they seek information that will assist them in testing the accuracy of that information." *Ibid.* The court acknowledged that "the disclosure of the Haitians' names and addresses, in and of itself, will not tell [respondents] anything about Haiti's treatment of its returnees or the U.S. government's honesty about the matter." *Ibid.* But the court found it sufficient that release of the names "will give [respondents] a means to obtain 'public interest' information in that they can then locate the Haitian returnees and inquire about how they were treated after they were returned to Haiti." *Ibid.*

The court rejected the government's contention that requiring disclosure in this case would be inconsistent with *Department of Justice* v. *Reporters Committee for Freedom of the Press*, 109 S. Ct. 1468 (1989). App., *infra*, 10a-12a. It observed that in *Reporters Committee*, this Court had concluded that disclosure of criminal history information about an individual in a "rap sheet" maintained by the Federal Bureau of Investigation would reveal little about the conduct of the government. The court of appeals believed this case to be different because respondents "seek information about individuals that will help them to scrutinize what our government is doing and saying regarding Haitians who unsuccessfully attempt to flee to this country." *Id.* at 11a-12a.

b. The court of appeals also affirmed the district court's ruling that the State Department had waived its right to rely on Exemptions 1, 7(C) and 7(D) by failing to raise those arguments prior to the district court's rejection of its Exemption 6 claim. App., *infra*, 13a-15a. The court recited the government's representations that its failure to invoke Exemptions 1 and 7 was the result of pure mistake and that those claims "involve grave concerns of national security and foreign policy." *Id.* at 14a. And it recognized that under *Jordan* v. *Department of Justice*, 591 F.2d 753, 780 (D.C. Cir. 1978) (en banc), an appellate court may consider a claim of exemption that was not raised at all before the district court, if

the omission was due to pure mistake, the value of the material is very high, and it appears highly likely that the exemption does apply. But the court declined to follow that approach. Without discussing the State Department's declarations that explained the national security reasons for the classification decision, the court simply observed that it found it "difficult to believe that the redacted information implicates compelling national security concerns" in light of the government's failure to raise those concerns during the two-year period that the case was pending in the district court. *Ibid.*[5]

REASONS FOR GRANTING THE PETITION

In a highly sensitive setting involving the foreign relations of the United States, the court of appeals' decision seriously misconstrues Exemption 6 of the Freedom of Information Act, abrogates a clear governmental pledge of confidentiality, and conflicts with the analytical framework prescribed by *Department of Justice* v. *Reporters Committee for Freedom of the Press*, 109 S. Ct. 1468 (1989).

The decision below greatly undervalues the substantial privacy interests at stake for the Haitian nationals whose names the court of appeals has ordered the State Department to make public: it eviscerates both the State Department's promise of confidentiality and the Haitians' expectations of privacy that rested on that promise; it exposes the Haitians to the stigma of public identification as persons who cooperated with U.S. officials; it orders the release of unredacted copies of interview sum-

[5] On October 12, 1990, the court of appeals denied the State Department's petition for rehearing and suggestion for rehearing en banc. App., *infra*, 34a-35a. The court thereafter granted the government's motion for a stay of the mandate pending the filing and disposition of a petition for a writ of certiorari, provided that the petition was filed by November 13, 1990. The court of appeals previously had granted the government's motion for a stay pending rehearing, conditioned upon the government's filing the deleted information with its clerk, to be held under seal.

maries that reveal much private information about the cooperating Haitians; and it expressly contemplates (indeed applauds) the prospect that respondents will track down the individual Haitians and challenge the veracity of what they said (or were reported to have said) about their own government. Each of these invasions of privacy is unprecedented in FOIA caselaw and is alone sufficient to preclude disclosure here. The fact that the court of appeals nevertheless ordered public disclosure of the Haitians' names in the face of the *combined* force of these privacy interests demonstrates the degree to which its holding departs from the central purposes of Exemption 6.

The court countenanced these invasions of privacy by adopting a view of the countervailing "public interest" in disclosure that cannot be reconciled with the text or purposes of FOIA or with this Court's decision in *Reporters Committee*. The court of appeals did not find respondents entitled to obtain the names of the Haitian nationals based on the intrinsic informational value of those records, because, as the court acknowledged, the names reveal nothing about the operation of the government. Rather, it justified disclosure on the basis of respondents' plans to use those names as leads in their own investigation of conditions in Haiti, which they believed might in turn shed light on the State Department's performance of its responsibilities with respect to refugees. Under this derivative-use rationale, virtually any private information in government files—for example, the names deleted from the disciplinary summaries in *Department of Air Force* v. *Rose*, 425 U.S. 352 (1976), or the rap sheet in *Reporters Committee*—might be subject to disclosure to anyone who represents that he or she needs the information to investigate the particular government program. This vision of FOIA, and of Exemption 6, is inconsistent with the teaching of *Reporters Committee* that information is protected against mandatory disclosure if it would, in itself, "tell us nothing *directly* about" the conduct of government. 109 S. Ct. at 1482 (em-

phasis added). These rulings below conflict with decisions of other courts of appeals and threaten to eviscerate FOIA's protections for personal privacy. Review by this Court therefore is warranted.

The courts below also erred in refusing to entertain the State Department's submission that the identities of the Haitian nationals are protected by Exemptions 1 and 7 because those claims were not raised at an earlier stage in the district court proceedings. As a result, the judgment below requires the disclosure of sensitive information that has been classified by the State Department in the interest of national security and jeopardizes efforts by the United States to assure humanitarian treatment of refugees and respect for human rights. Review of this issue is warranted both to prevent the substantial public and private injuries that will be sustained if the classified information at issue here cannot be protected, and, more generally, to prescribe standards for addressing the government's invocation of exemptions in similar circumstances.

A. Although FOIA enacted a "broad philosophy of 'freedom of information,'" Congress found it "'necessary to protect certain equally important rights of privacy with respect to certain information in government files.'" *Department of Air Force* v. *Rose*, 425 U.S. at 372-373 n.9 (quoting S. Rep. No. 813, 89th Cong., 2d Sess. 3 (1965)). FOIA addresses these privacy concerns most broadly through Exemption 6, which provides that the Act "does not apply" to information "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552 (b)(6). This standard "'exclude[es] those kinds of files the disclosure of which might harm the individual,'" and, more generally, "'enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information.'" *Rose*, 425 U.S. at 372 (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966), and

S. Rep. No. 813, *supra*, at 9); *Reporters Committee*, 109 S. Ct. at 1483.[6]

In light of FOIA's special respect for personal privacy, "it should come as no surprise that in none of [its] cases construing the FOIA [has the Court] found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen." *Reporters Committee*, 109 S. Ct. at 1482. The court of appeals' decision in this case, however, does just that, seriously eroding the important protection afforded to personal privacy by Exemption 6 and substantially departing from the principles announced by this Court in *Reporters Committee* and other cases, and followed by other courts of appeals. The court's errors affect both the privacy and public-interest sides of the balance.

1. Although the court of appeals recognized that there are "significant privacy interests at stake" in this case, App., *infra*, 8a, it undervalued those interests in every critical respect. The cumulative nature of the court's errors suggests the need for guidance from this Court in formulating a structured rather than an ad hoc approach to identifying and assessing the relevant privacy considerations.

a. It is important at the outset to emphasize the context in which the particular privacy interests arise. In this case, as the court of appeals pointed out, the Haitian returnees "were promised confidentiality before they talked with U.S. government officials." App.,

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[6] In the law enforcement context, Exemption 7(C) provides further protection of privacy interests by excluding from mandatory disclosure information that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). Both Exemption 6 and Exemption 7(C) call for a determination of the impact of disclosure upon personal privacy, as evidenced by the Court's application of the analytical framework of *Rose* in *Reporters Committee*. See 109 S.Ct. at 1476, 1478. Although the relative *weight* given the respective interests may differ under Exemptions 6 and 7(C), the discussion in *Reporters Committee* of the *types* of private and public interests to be considered under Exemption 7(C) applies to Exemption 6 as well.

infra, 7a. The court acknowledged that such a promise "adds weight to the privacy interests at stake here," but it did not believe that withholding was "compel[led]" on this ground. *Id.* at 7a-8a. Having said this much, the court gave no indication that it then took this factor into account in any meaningful way, even though the consequence of its ruling is that the United States will not be able to keep its word. In fact, established principles furnish guidance on the relevance of such a promise.

Assurances of confidentiality heighten an individual's expectation of privacy; in consequence, the release of information provided under such a pledge "involves a greater invasion of privacy than release of information provided without such a pledge." *Washington Post Co.* v. *HHS*, 690 F.2d 252, 263 (D.C. Cir. 1982). For this reason, "a government pledge of confidentiality, made in good faith and consistently honored, should generally be given weight on the privacy side of the scale in accord with its effect on expectations of privacy." *Ibid.* In *Washington Post* and *Robles* v. *EPA*, 484 F.2d 843, 846 (4th Cir. 1973), which were cited by the court of appeals for the proposition that a promise of confidentiality is not controlling (App., *infra*, 7a-8a), the pledge of confidentiality was limited and uneven, and there was correspondingly less reason to believe that it had led to a heightened expectation of privacy. In this case, by contrast, the interviews "were conducted with the clear understanding that they would be held confidential," and the uncontradicted record establishes that this understanding was important in causing the Haitian nationals to confide in U.S. officials. Melton Decl. ¶¶ 7-8, 10, 12; Byrd Decl. ¶¶ 10-12, 15. Thus, contrary to the court of appeals' belief, the test announced in the D.C. Circuit's *Washington Post* decision strongly supports withholding here.

Reporters Committee likewise supports the conclusion that expectations of privacy induced by this sort of understanding should be respected. The Court stressed in *Reporters Committee* that an important aspect of the

privacy protected by FOIA is "the individual's control of information concerning his or her person," because "information may be classified as 'private' if it is 'intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public.'" 109 S. Ct. at 1476 (quoting *Webster's Third New International Dictionary* 1804 (1976)). Where an individual voluntarily furnishes personal information to the government in reliance on a promise that it will be "restricted" to government use and not be "freely available to the public," a due regard for the individual's right not to have given that information in the first place should ordinarily allow the government to honor its promise. "Great nations, like great men, should keep their word." *Heckler* v. *Mathews*, 465 U.S. 728, 748 (1984); cf. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1010-1012 (1984).[7]

b. The privacy interests are enhanced in this case because of the nature of the information to which the expectation of privacy attaches. In the first place, disclosure of the individual Haitians' names would immediately and publicly identify them as persons who cooperated with the United States Government on a confidential basis by furnishing it with information about

[7] A similar protection for information submitted on the understanding that it will be kept confidential is reflected in Exemption 4, which applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4); see H.R. Rep. No. 1497, *supra*, at 10 (Exemption 4 applies to information obtained through "questionnaires" and to material that "would not customarily be made public by the person from whom it was obtained"; "a citizen must be able to confide in his Government," and "where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations"). The same policy is embodied in Exemption 7(D), which applies to information compiled for law enforcement purposes the disclosure of which could reveal a "confidential source," including a state, local or foreign agency or private entity "which furnished information on a confidential basis." 5 U.S.C. 552(b)(7)(D).

the Haitian Government and their treatment by it. As the Eaves Declaration points out (at ¶ 8), this "would * * * subject them or their families to possible embarrassment in their social and community relationships." Mr. Eaves' guarded diplomatic understatement cannot obscure the basic point: cooperation with United States officials by foreigners is not always greeted with equanimity by the foreigners' government or countrymen—particularly when the cooperation concerns the conduct of that government. Compare *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 597 n.2 (1982) (quoting State Department affidavit) (certain Iranian leaders "have been strongly criticized in the press for their alleged ties to the United States," and "[a]ny individual in Iran * * * having American connections is looked upon with mistrust").

Furthermore, the redacted versions of the interview reports that have already been released to respondents contain private information about many of the persons who were interviewed: *e.g.*, marital status and number of children, employment status or history, living conditions, the circumstances of past attempts to enter the United States, or the receipt of Red Cross aid upon return.[8] If unredacted versions of the reports now must be made available under FOIA, as the courts below have ordered, the reports would reveal much information about the subjects of the reports that would unquestionably constitute a "clearly unwarranted" invasion of privacy under this Court's cases. Compare *Rose*, 425 U.S. at 375-377; *Washington Post*, 456 U.S. at 600-601; *Reporters Committee*, 109 S. Ct. at 1476-1480. In no FOIA case of which we are aware has a requester obtained personal information of this sort.

c. The decision below will also result in the invasion of an important aspect of privacy in addition to the right

[8] Redacted copies of the 17 documents, some of which consist of a number of separate interview summaries, are included as attachments to the Eaves Declaration.

to control dissemination of information about one's self—namely, "the right to be let alone." *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). As the court of appeals recognized, respondents seek to identify the Haitian citizens who were interviewed on a confidential basis for the specific purpose of enabling respondents to contact those individuals personally and question them about how they have been treated by the Haitian Government since their return. App., *infra*, 7a.

In several recent decisions involving FOIA requests for lists of names and addresses of present or former federal employees, the D.C. Circuit has found a significant invasion of personal privacy solely by virtue of the potential that disclosure would lead to " 'an unwanted barrage of mailings and personal solicitations' " of a commercial or charitable nature.[9] The invasion of privacy in this case would be far more serious, because respondents intend to conduct in-depth interviews of the individual Haitians on subjects they heretofore have discussed with representatives from the United States only in confidence, and to challenge the veracity of what those individuals previously said (or were reported to have said). Cf. *Rowan* v. *Post Office Dept.*, 397 U.S. 728, 737 (1970). The court of appeals failed to appreciate the magnitude of this further invasion of privacy, which, contrary to that court's holding, is sufficient in itself to preclude disclosure of the names respondents seek. See

[9] *National Ass'n of Retired Federal Employees* v. *Horner*, 879 F.2d 873, 876 (D.C. Cir. 1989) (quoting *Minnis* v. *Department of Agriculture*, 737 F.2d 784, 787 (9th Cir. 1984)), cert. denied, 110 S. Ct. 1805 (1990); *FLRA* v. *Department of the Treasury*, 884 F.2d 1446, 1452 (D.C. Cir. 1989), certs. denied, 110 S.Ct. 863 and 864 (1990); accord, *Department of Agriculture* v. *FLRA*, 836 F.2d 1139, 1143 (8th Cir. 1988), vacated on other grounds, 109 S. Ct. 831 (1989); *AFGE* v. *HHS*, 712 F.2d 931, 932 (4th Cir. 1983); *Wine Hobby USA, Inc.* v. *IRS*, 502 F.2d 133, 136-137 (3d Cir. 1974).

Heights Community Congress v. *Veterans Administration*, 732 F.2d 526 (6th Cir.), cert. denied, 469 U.S. 1034 (1984), discussed at page 23, *infra*. Combined with the other invasions of privacy discussed above, the interests on the privacy side of the balance are compelling.

2.a. The court of appeals plainly erred in its assessment of the other side of the balance as well. *Reporters Committee* makes clear that any public interest supporting disclosure in this setting must rest on "the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny,' * * * rather than on the particular purpose for which the document is being requested." 109 S. Ct. at 1481 (quoting *Rose*, 425 U.S. at 372). FOIA "create[s] a broad right of access to 'official information,'" so that the people may be "informed about 'what their government is up to.'" *Ibid.* (quoting *EPA* v. *Mink*, 410 U.S. 73, 80 (1973), and *id.* at 105 (Douglas, J., dissenting)). "That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various government files but that reveals little or nothing about an agency's own conduct." *Ibid.* It follows that the public-interest inquiry under FOIA's privacy exemptions is an objective one, based upon the intrinsic value of the requested material in conveying information about the conduct of government.

Consistent with this understanding, the Court explained in *Reporters Committee* that *redacted* versions of the Air Force Academy disciplinary-hearing summaries at issue in *Rose* were an appropriate subject of a FOIA request, because they showed how the disciplinary procedures actually functioned. By contrast, the Court explained that deletion of information that "would identify the particular cadets to whom the summaries related" was "unquestionably appropriate," because the names were irrelevant to the inquiry into the way the Academy administered its honor code. 109 S. Ct. at 1481-1482. The Court similarly concluded in *Reporters Committee* that the purposes of FOIA would not be furthered by release of a rap sheet containing the criminal history of an individual, even though the requesters sought that information because the individual allegedly had improper dealings with a corrupt Congressman and was an officer of a corporation having defense contracts. The Court pointed out that the requested information "would tell us nothing *directly* about the character of the *Congressman's* behavior" or "about the conduct of the *Department of Defense*" in awarding contracts to the corporation. *Reporters Committee*, 109 S.Ct. at 1482 (first emphasis added).

The State Department's treatment of respondents' FOIA request in this case directly parallels the course approved by the Court in *Rose* and *Reporters Committee*. It was "unquestionably appropriate" for the State Department to delete the names of the individual Haitians from the interview summaries released to respondents, because the names were "irrelevant" to the public's assessment of the interview process summarized in the reports; as in *Rose*, "leaving the identifying material in the summaries would therefore have been a 'clearly unwarranted' invasion of individual privacy." *Reporters Committee*, 109 S. Ct. at 1482. Accord, *Halloran* v. *Veterans Administration*, 874 F.2d 315, 324 (5th Cir. 1989); *Miller* v. *Bell*, 661 F.2d 623, 630-631 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982). And as in *Reporters Committee*, disclosure of the Haitians' names "would [not] tell us anything about the conduct of the *Department of* [*State*]." 109 S. Ct. at 1482. In fact, the court of appeals acknowledged that "the disclosure of the Haitians' names and addresses, in and of itself, will not tell [respondents] anything about Haiti's treatment of its returnees or the U.S. government's honesty about the matter." App., *infra*, 9a. That should have been the end of the case.

b. The court of appeals sought to avoid this result by reasoning that "the identifying information will give

[respondents] a means to obtain 'public interest' information in that they can then locate the Haitian returnees and inquire about how they were treated after they were returned to Haiti"—which the court apparently believed would then shed light on the State Department's performance. App., *infra*, 9a. There are a number of flaws in this analysis.

First, it invites wholesale circumvention of the important protection afforded to personal privacy under FOIA. In *Rose*, for example, the court of appeals' reasoning presumably would have required the Air Force to disclose the names it had deleted from the disciplinary-hearing summaries if the requesters had represented that they planned to contact the current and former cadets involved and ask them about the truth of the summaries and the fairness of the proceedings. Similarly, in *Reporters Committee*, the requesters might have obtained the rap sheet simply by expressing their intention to use it to investigate whether the FBI maintained accurate rap sheets or pursued all allegations of criminal activity they contain. Indeed, under the court of appeals' rationale, a requester could obtain access to a broad range of otherwise confidential files maintained in the health, welfare, selective service and veterans programs that FOIA's legislative history identifies as deserving of protection under Exemption 6 (see *Rose*, 425 U.S. at 375-376), so long as he planned to contact the individuals involved and interview them as part of an investigation into the administration of those governmental programs. That result would conflict with Congress's determination when it enacted FOIA that "these files should not be opened to the public." S. Rep. No. 813, *supra*, at 9.

Second, the court of appeals' derivative-use rationale cannot be squared with the holding in *Reporters Committee* that disclosure is not required if the requested information itself "would tell us nothing *directly*" about the conduct of the government. 109 S. Ct. at 1482 (emphasis added). This important limiting principle is rooted

in FOIA's text and purposes. FOIA regulates the public availability of "agency records" (5 U.S.C. 552(a)(4)(B)—*i.e.*, "official information" that is already in the possession of the agency and that documents or governs the conduct of its official business. *Reporters Committee*, 109 S. Ct. at 1481 & n.20. FOIA is not intended to facilitate access to information outside a federal agency, even where it has some relation to that agency's work. *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 150-154 (1980). For this reason, Exemption 6 requires "a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to *governmental* information." *Rose*, 425 U.S. at 372 (quoting H.R. Rep. No. 1497, *supra*, at 11) (emphasis added). Respondents' desire to obtain *nongovernmental* information from private sources in Haiti that might shed light on the conduct of the Haitian Government—and, in turn, on the State Department's conduct in response—bears too indirect and attenuated a relationship to the purposes of FOIA to justify an invasion of the important privacy interests of the Haitian nationals that are protected by Exemption 6.

Third, the court of appeals' reliance on respondents' asserted plan to contact the Haitian nationals conflicts with the holding in *Reporters Committee* that "whether an invasion of privacy is *warranted* cannot turn on the purposes for which the request for information is made." 109 S. Ct. 1480; see 5 U.S.C. 552(a)(3) (emphasis added) ("each agency, upon *any* request for records * * * shall make the records promptly available to *any* person"). Furthermore, an approach that turned on the derivative use that requesters intended to make of government records, rather than on their intrinsic informational value, would introduce undue speculation and complexity into the application of Exemption 6. In this case, for example, an accurate weighing of the asserted public interest in respondents' endeavor would require an

assessment of the likelihood that some number of the Haitian nationals would consent to be interviewed by respondents and would change their stories, and that respondents would be able to show that State Department officials were aware or should have been aware of the true circumstances. Congress did not intend the protection of privacy interests under Exemption 6 to depend upon such vague calculations.

Thus, when the respective elements of the private and public interests are brought more sharply into focus, the insubstantial and attenuated nature of the supposed public interest in identifying private Haitian citizens becomes apparent. Indeed, as explained above, that supposed interest is different in kind, not merely in degree, from the "public's right to *governmental* information," on which FOIA is based. H.R. Rep. No. 1497, at 11 (emphasis added).

3. The court of appeals' holding that the identities of the Haitian nationals are not protected from public disclosure by Exemption 6 warrants review for a number of reasons. First, its essentially ad hoc reasoning fails to accord the respect due the State Department's pledge of confidentiality, denigrates basic privacy values recognized by this Court in *Rose*, *Washington Post* and *Reporters Committee*, and minimizes the Haitians' privacy right under FOIA to be left alone. Second, the court of appeals' derivative-use rationale for mandating disclosure of private information fundamentally misconceives the relevant public interest under Exemption 6, as construed in *Reporters Committee*. Review by this Court could serve to furnish needed guidance to the lower courts on both aspects of the Exemption 6 analysis. The court of appeals' derivative-use rationale is of especially broad significance under FOIA, because—if permitted to stand—it would make substantial inroads on privacy protection and this Court's teaching in *Reporters Committee*.

Furthermore, both of these aspects of the decision below conflict with rulings by other courts of appeals.

The privacy ruling conflicts with the Sixth Circuit's pre-*Reporters Committee* decision in *Heights Community Congress* v. *Veterans Administration*, *supra*. There, the requester sought various documents utilized in VA loan guarantees in order "to determine if black veterans were receiving equal access to federal loan guarantees and to further investigate the possibility that lenders and realtors were manipulating the VA loan program so as to steer white and black veterans into specific areas." 732 F.2d at 527. The documents were released but, as here, all names and other identifying information were deleted. *Id.* at 528. The Sixth Circuit sustained the withholding, despite the acknowledged public importance of the racial steering issue. It was especially concerned that persons armed with the information could track down individual homeowners and interrogate them. In the court's view, "[h]olding a person's privacy hostage in this fashion is contrary * * * to the basic right * * * simply to be left alone." *Id.* at 530. Thus, the very sort of survey that was accepted by the court below as a justification for disclosure was found in *Heights Community Congress* to be antithetical to privacy interests protected by Exemption 6.

On the public-interest point, the decision below squarely conflicts with the D.C. Circuit's post-*Reporters Committee* ruling in *National Ass'n of Retired Federal Employees* v. *Horner*, *supra*. In that case, NARFE requested a list of the names and addresses of recent government retirees. 879 F.2d at 874. The court found no public interest, under *Reporters Committee*, that would outweigh what it termed the "significant" privacy interest involved. In response to NARFE's argument "that disclosure of the annuitants' names and addresses would aid NARFE in its lobbying activities, and thus result in the passage of laws that would benefit the public in general and federal retirees in particular," the D.C. Circuit observed that those considerations involved not what the government is up to, "but only what it might be up to if NARFE had its druthers." *Id.* at 879. The court likewise rejected the

asserted justification that disclosure of the names and addresses of federal annuitants would inform the public where its money is going, reasoning that under *Reporters Committee*, "unless the public would learn something *directly* about the workings of the *Government* by knowing the names and addresses of its annuitants, their disclosure is not affected with the public interest." *Ibid.* (first emphasis added).

If the court below had followed *NARFE*, then once it concluded that disclosure of the Haitians' names would not tell respondents anything about "Haiti's treatment of its returnees or the U.S. government's honesty about it," App., *infra*, 9a, the public-interest inquiry would have been at an end. Just as NARFE could not learn the identities of federal annuitants in order to enlist them in an effort to change government policy by lobbying, respondents may not learn the identities of the Haitian nationals in order to enlist them, through interviews, in an effort to monitor and change the State Department's approach to securing fair treatment of returnees by the Haitian Government. Accord, *Miller* v. *Bell*, 661 F.2d at 630.[10] These circuit conflicts warrant resolution.

B. The courts below also plainly erred in their refusal to entertain the State Department's submission that the identities of the Haitian nationals are properly classified in the interest of national security and are protected by FOIA Exemptions 1, 7(C) and 7(D). The district

[10] The D.C. Circuit reached a similar result in *FLRA* v. *Department of the Treasury*, *supra*, in which the FLRA ordered several federal agencies to supply labor unions with the names and home addresses of federal employees in collective bargaining units. The lawfulness of the FLRA's orders depended upon whether disclosure was required under FOIA, and the court held that it was not. The court recognized that the names of federal employees might provide leads for an investigative reporter to "ferret out what 'government is up to,'" but it found the public interest in disclosure for that purpose to be both minimal and insufficient to outweigh the workers' "significant" interest in the privacy of their homes. 884 F.2d at 1452-1453.

court, affirmed by the court of appeals, held that the State Department had waived its right to rely on those Exemptions because it did not invoke them until after the district court rejected its Exemption 6 claim. App., *infra*, 13a-15a, 32a-33a.

1. a. We readily acknowledge that the government should ordinarily be expected to invoke the FOIA exemptions upon which it relies in a timely manner in the district court. But mistakes and oversights inevitably occur in the processing and litigation of the daunting volume of FOIA requests, and important public interests in the confidentiality of governmental information should not automatically be sacrificed when they do. Cf. *OPM* v. *Richmond*, 110 S. Ct. 2465, 2469 (1990). The court of appeals agreed that the courts do have "some discretion" to take account of these practical realities "where justice so requires." App., *infra*, 14a. In fact, as the court of appeals recognized, *ibid.*, the en banc D.C. Circuit stated in the leading case in this area, *Jordan* v. *Department of Justice*, *supra*, that an appellate court has discretion to reach the merits of a FOIA exemption that (unlike those at issue here) was never even raised in the district court, if the failure to invoke the exemption was due to "pure mistake," if "the value of the material" is "obviously high, *e.g.*, confidential information compromising the nation's foreign relations or national security," and if it appears "highly likely" that the material was intended to be covered by one of the exemptions. 591 F.2d at 780. See also *Ryan* v. *Department of Justice*, 617 F.2d 781, 792 (D.C. Cir. 1980) (similar exception for "sensitive, personal private information"). *Jordan* further indicated that such discretion might be exercised to permit an agency to invoke an exemption for the first time on appeal where there has been a substantial change in the factual context or applicable legal doctrine. *Ibid.*; see *Washington Post Co.* v. *HHS*, 795 F.2d 205, 208 (D.C. Cir. 1986) (noting foregoing exceptions). These standards were satisfied here.

First, the court of appeals noted, and did not dispute, the State Department's explanation that its failure to invoke Exemptions 1 and 7 at an earlier time "was the result of pure mistake." App., *infra*, 14a. As Mr. Byrd stated in his declaration filed in the district court to explain the classification decision, when respondents first filed their FOIA request in 1987, the documents were reviewed by staff in the State Department's FOIA office who had only limited knowledge of the Haitian returnee program. They withheld the names under Exemption 6 because of the obvious privacy interests in the interview setting. Byrd Decl. ¶¶ 3, 4. However, immediately after the court issued its March 1989 order requiring disclosure, the matter was presented to the Acting Assistant Secretary of State for Inter-American Affairs, who "examined the issue and strongly opposed the release of the names based upon the foreign policy implications that such release would have." *Id.* ¶ 5. The matter was then referred to Deputy Assistant Secretary Melton, who promptly instituted a classification review and prepared a declaration to accompany the government's motion invoking Exemptions 1 and 7, which explained the foreign relations and law enforcement context of the Haitian returnee program. *Ibid.*; see pages 4-6, *supra*.

Second, as to the "value" of the information, the record shows that if confidentiality is breached, the identities of confidential sources and other information that has been classified in the interest of national security will be compromised. Compare *Jordan*, 591 F.2d at 780; *Washington Post*, 795 F.2d at 208. As a result, persons in Haiti and other countries will be reluctant to cooperate with U.S. officials; the United States will be "severely handicapped in its ability to obtain the information necessary to assess the success of its agreement with Haiti and the interdiction program"; its ability to monitor human rights violations in other countries will be impaired; and persons who have been persecuted will be fearful of informing the State Department about their mistreatment. Melton Decl. ¶¶ 10-12; see pages 5-7, *supra*. In addition, the personal privacy of the many Haitian nationals who cooperated with U.S. officials will be seriously invaded.

Third, Congress clearly did not intend to compel disclosure in this case. The information qualifies for withholding under Exemption 1 because its "unauthorized disclosure * * * reasonably could be expected to cause damage to the national security." Byrd Decl. ¶ 10 (quoting Exec. Order No. 12356, § 1.1(a)(3)). The information also is properly withheld under Exemptions 7(C) and 7(D). It was compiled for law enforcement purposes, in furtherance of the government's responsibilities under the federal statutes and international agreements regulating immigration and protecting refugees. Exemption 7(D) authorizes an agency to withhold information whenever disclosure "could reasonably be expected to disclose the identity of a confidential source," a prospect that cannot be seriously contested here. Moreover, given the court of appeals' view that this is a "close" case under Exemption 6, App., *infra*, 13a, there are firm grounds, even on that court's own terms, for withholding the names under Exemption 7(C)'s more lenient standard.

b. The court below cited *Jordan*, but only for the limited proposition "that courts have some discretion to excuse untimeliness where justice so requires." App., *infra*, 14a. Like the district court, it declined to inform its discretion in the manner indicated by that decision.[11] The sum total of its analysis was the observation that it was "difficult to believe that the redacted information implicates compelling national security concerns," in light of the State Department's failure to raise those concerns while the case was pending in the district court for al-

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[11] In this case, of course, the State Department did not invoke Exemptions 1 and 7 for the first time on appeal; it invoked them in the district court, after that court rejected the Exemption 6

most two years. App., *infra*, 9a. The court completely ignored the explanation in the Byrd Declaration, which shows that the identities of the Haitian nationals were immediately classified when the matter was brought to the attention of an official in a position to make the requisite foreign policy judgment. The court also failed to address the detailed explanation in the Melton and Byrd Declarations of the national security considerations warranting classification. When Congress amended Exemption 1 in 1974, it made clear that courts must accord "substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record." H.R. Conf. Rep. No. 1380, 93d Cong. 2d Sess. 11 (1974). Compliance with that admonition is necessary to satisfy the *constitutional* requirement that courts accord the Executive the "utmost deference" in this area. *United States* v. *Nixon*, 418 U.S. 683, 710 (1974). The court of appeals failed to fulfill that responsibility, instead indulging its own view that it was "difficult to believe" that disclosure implicated national security concerns.

2. The Exemption 1 issue presents special considerations for an additional reason. That Exemption applies only to matters that are both "specifically authorized" under criteria in an Executive order to be kept secret in the interest of national deefnse or foreign policy, and "in fact properly classified pursuant to such Executive order." When the district court rejected the State Department's reliance on Exemption 6 and ordered it to disclose the identities of the Haitian nationals, that information had not "in fact" been classified pursuant to the Executive Order; the necessary predicate for invoking Exemption 1 therefore was lacking at that time. Under both *Jordan* and general equitable and constitutional principles, the subsequent classification of the material

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claim but prior to final judgment. See page 4, *supra*. This therefore was an occasion for even greater flexibility than *Jordan* might otherwise provide.

pursuant to Presidential authority constituted an intervening change in the governing factual and legal context of the case that warranted modification of the district court's injunctive order requiring disclosure. See 591 F.2d at 789; *Washington Post*, 795 F.2d at 208; Fed. R. Civ. P. 60(b)(5) and (6); *System Fed'n No. 91, Ry. Employes' Dep't* v. *Wright*, 364 U.S. 642 (1961); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 430-432 (1855); *Dames & Moore* v. *Regan*, 453 U.S. 654, 684-685 (1981); *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch)) 103, 110 (1801). In short, the Department of State raised the Exemption 1 claim as soon as the claim was properly available to it, after the information was classified.

3. It would be appropriate for this Court to grant review to afford guidance to the lower courts in addressing claims of exemption raised in circumstances such as these, rather than leaving the matter to the sort of unfettered discretion that the court of appeals appeared to invoke in this case. "[D]iscretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" *Albemare Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975) (quoting *United States* v. *Burr*, 25 Fed. Cas. 30, 35 (C.C. Va. 1807) (Marshall, C.J.)). The question is especially appropriate for resolution here, because it arises in the sensitive context of inquiries conducted in confidence by U.S. officials concerning the treatment by a foreign government of its own nationals within its own territory. As we have explained (see page 7, *supra*), the State Department has broad responsibilities for monitoring human rights violations in other nations, and those efforts play an important role in the enforcement of our own laws as well, such as those governing refugee and asylum applications. If permitted to stand, the decision below will undermine the State Department's ability to assure the confidentiality of contacts with foreign nationals who furnish essential information on these and other subjects.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

STUART M. GERSON
Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

LEONARD SCHAITMAN
BRUCE G. FORREST
Attorneys

NOVEMBER 1990

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 89-5375

MICHAEL D. RAY, Individually and as Attorney for Certain Haitian National Clients and Ives Audate, Jean Hevil Loiseau and Yvon Nicholas, PLAINTIFFS-APPELLEES, CROSS-APPELLANTS

v.

UNITED STATES DEPARTMENT OF JUSTICE, Immigration and Naturalization Service and the State Department, DEFENDANTS-APPELLANTS, CROSS-APPELLEES

Appeal from the United States District Court
for the Southern District of Florida

Aug. 17, 1990

Before FAY and JOHNSON, Circuit Judges and FLOYD R. GIBSON *, Senior Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge:

Michael Ray, individually and on behalf of three named Haitians seeking political asylum in the United States, brought this action under the Freedom of Information Act ("FOIA") and the Adminis-

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* Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

trative Procedure Act to compel the production of records from three federal agencies and for declaratory and injunctive relief from exclusion and deportation proceedings. In response to the plaintiffs' FOIA request, the Department of State produced 25 documents but redacted certain identifying information from 17 of them, claiming that the information was exempt from disclosure under FOIA. The district court ruled that the FOIA exception was not applicable and ordered the State Department to disclose the redacted information. The district court also dismissed the FOIA claims against the other two agencies, refused to enjoin the plaintiffs' deportation and exclusion proceedings, and refused the plaintiffs' request for class certification. Both sides appeal. We affirm the district court's decision.

I. FACTS

Named as defendants in this case are the Immigration and Naturalization Service of the United States Department of Justice ("INS"); the Executive Office for Immigration Review, Office of the Immigration Judge ("EOIR"); and the United States Department of State. Primarily, the plaintiffs seek information regarding how the Haitian government treats its citizens who have attempted unsuccessfully to flee to the United States and are returned to Haiti. The plaintiffs' desire for this information was triggered by two articles in Miami newspapers in which INS officials were quoted as stating that Haitian returnees were not being persecuted after they returned to Haiti. The first article stated that an INS district director so strongly believed that Haitian returnees were not being persecuted in Haiti that he "even offered to provide names of 600 Haitians who have

been sent back so that doubters can go to Haiti and speak to the people directly." Record Excerpts at 140 (quoting Miami News, March 12, 1985). In the second article, an INS official was quoted as stating that the "INS routinely sends inspectors to Haiti to interview people who have been returned by American authorities [and] failed emigees reported no persecution since their return." Record Excerpts at 119 (quoting The Miami Herald, Dec. 31, 1984).

The plaintiffs disagree with the view that returned Haitians are not subject to persecution. They submitted FOIA requests with the INS and the State Department seeking reports of interviews by INS officials with persons who had been involuntarily returned to Haiti. Dissatisfied with what they received, the plaintiffs filed this suit in November 1986 against the State Department, the INS, and the EOIR. The plaintiffs sought: (1) class certification; (2) an order compelling the defendants to comply with their FOIA requests; (3) an order enjoining the plaintiffs' final deportation and exclusion hearings until the defendants provided the requested information and for a period of six months thereafter; and, (4) an order enjoining the dissemination of disinformation by the defendants to the public concerning the fate of Haitian returnees.

The plaintiffs seek an injunction against their deportation proceedings because they believe that they cannot adequately make their cases for political asylum unless they can produce evidence that the Haitian government will persecute them if they are returned. Because of the views expressed by government officials in the Miami newspapers, the plaintiffs anticipate that the State Department, which routinely issues advisory opinions to the INS regarding

asylum applications, will represent to the INS that returned Haitians do not face ill treatment in Haiti. The plaintiffs believe that the information they requested under FOIA is essential to their effort to show that they will be subject to punishment in Haiti, and thus they requested the district court to enjoin those proceedings until they receive the information and have had an opportunity to examine it.

In a motion for summary judgment, the INS maintained that it had no records that were responsive to the plaintiffs' FOIA requests, and the EOIR maintained that the district court lacked jurisdiction to consider claims against it because the plaintiffs never submitted a FOIA request to the EOIR. The State Department did produce 25 documents, but from 17 of them the names, addresses, and other identifying information were redacted. The State Department submitted that the withholding of this identifying information was sanctioned by 5 U.S.C. § 552(b)(6) ("Exemption 6"), which exempts from FOIA's mandatory disclosure requirements disclosures which would cause "a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (1988).

The district court found that the plaintiffs never made a FOIA request to the EOIR. It further found that the INS had conducted a proper search of its records pursuant to the plaintiffs' request and that the record failed to disclose that the INS was improperly withholding any relevant documents. Accordingly, the district court granted summary judgment to the INS and EOIR. *Ray v. United States Dept. of Justice*, 725 F. Supp. 502, 504-05 (S.D. Fla. 1989).

With regard to the State Department, the district court ruled that Exemption 6 of FOIA did not apply to preclude disclosure of the redacted information. Thus, the court ordered the State Department to supply the redacted information within 15 days. Finally, the district court denied the plaintiffs' request for an order enjoining their deportation and exclusion proceedings and denied their motion for class certification. *Id.* at 505.

Both sides filed motions to alter or amend the judgment. The government's motion asked the district court to authorize the State Department's redactions under FOIA Exemptions 1 and 7 [1], which had not been raised before; the government also presented further argument under Exemption 6. The district court did not consider the government's Exemption 1 and 7 arguments, finding that the government waived those issues by failing to raise them prior to the district court's judgment. *Id.* at 505-06. The district court granted the State Department's motion for a stay pending appeal.

The State Department appeals the district court's ruling ordering it to supply the redacted information. The plaintiffs cross-appeal the district court's denial of class certification, its refusal to enjoin their deportation and exclusion proceedings, and its ruling that the searches conducted by the INS and the State Department were adequate.

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[1] Exemption 1 excludes matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1) (1988). Exemptions 7(C) and 7(D) exclude matters that are "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, [or] (D) could reasonably be expected to disclose the identity of a confidential source. . . ." 5 U.S.C. § 552(b)(7)(C) & (D) (1988).

We affirm the district court's judgment in all respects.

II. ANALYSIS

A. *The Government's Appeal*

1. Exemption 6 of FOIA

We begin with the arguments raised by the State Department as appellant in this case. The State Department appeals the district court's ruling that it must disclose the information that it redacted from the documents it supplied to the plaintiffs. The government submits that the redacted information, which consists of the names and other identifying information of the Haitian returnees who were interviewed, is exempt from disclosure by 5 U.S.C. § 552(b)(6), which provides that FOIA's mandatory disclosure requirement does not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (1988).

Because FOIA is a "broad disclosure statute which evidences a 'strong public policy in favor of public access to information in the possession of federal agencies'" *Cochran v. United States*, 770 F.2d 949, 954 (11th Cir. 1985) (quoting *Brown v. Federal Bureau of Investigation*, 658 F.2d 71, 73 (2d Cir. 1981)), the disclosure requirements of FOIA must be construed broadly and the exceptions narrowly. *Id.* Documents are presumed to be subject to disclosure; when the government seeks to invoke an exemption, it bears the burden of proving that the exemption applies. *Id. See also Department of the Air Force v. Rose*, 425 U.S. 352, 361, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976); *Ely v. Federal Bureau*

of Investigation, 781 F.2d 1487, 1489-90 (11th Cir. 1986); *Currie v. Internal Revenue Service*, 704 F.2d 523, 530 (11th Cir. 1983).

In determining whether Exemption 6 applies we apply a balancing test, "weighing an individual's right to protection of privacy against the public's right to disclosure of government information." *Cochran*, 770 F.2d at 955 (citations omitted). *See also Rose*, 425 U.S. at 372, 96 S.Ct. at 1604. After employing that test the district court in this case concluded that "[a]ny invasion of privacy from the mere act of disclosure of names and addresses would be de minimis and little more than speculation. . . . [T]he balance tilts in favor of disclosure of the names because any intrusion into the privacy of the Haitian nationals would be minimal." *Ray*, 725 F. Supp. at 505.

While we believe that the privacy interests at stake here are somewhat more significant than the district court considered them to be, we ultimately agree with the district court that "the balance tilts in favor of disclosure." *Id.* We think it important to candidly acknowledge that it appears that the plaintiffs seek the redacted information so that they can contact directly the Haitians who were interviewed by American officials and question them about how they are treated by the Haitian government since attempting to flee to the United States. In light of that fact, we find it difficult to characterize this invasion of the Haitian returnees' privacy to be no more than de minimis. We are also mindful, as the government points out, that the returnees were promised confidentiality before they talked with U.S. government officials. That, of course, is a factor that adds weight to the privacy interests at stake here, but is not a

factor that compels us to prohibit disclosure in this case. *See Washington Post Co. v. United States Dept. of Health and Human Services*, 690 F.2d 263 (D.C. Cir. 1982); *Robles v. Environmental Protection Agency*, 484 F.2d 843, 846 (4th Cir. 1973) ("promise of confidentiality is a factor be be considered," but cannot "in and of [itself], override the Act") (citaitons omitted). Thus, we begin the balancing process by acknowledging that there are significant privacy interests at stake here.

Despite that acknowledgment, we hold that disclosure is mandated because, when balanced against the legitimate public interest in the information, the privacy interest is outweighed. In this regard the government insists that no public interest cognizable under FOIA will be served by disclosure in this case, emphasizing the fact that the plaintiffs seek the information to further their individual interests in gaining political asylum. We recognize that the Supreme Court has made clear that the FOIA's basic purpose is to provide the public with a means of learning what its government is up to: the Act is not designed to assist citizens in gaining information about other individuals for private purposes. In *United States Dept. of Justice v. Reporters Committee*, —— U.S. ——, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989), the Court stated "the FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed." *Id.* 109 S.Ct. at 1482. Thus, in weighing the public interest served by a particular disclosure we must determine whether disclosure will serve FOIA's basic purpose—" 'to open agency action to the light of public scrutiny.' " *Rose*, 425 U.S. at 361,

96 S.Ct. at 1599 (quoting *Rose v. Department of the Air Force*, 495 F.2d 261, 263 (2d Cir. 1974)).

The government argues that the plaintiffs in this case seek the redacted information only to resist deportation efforts against them. We agree that to the extent that the plaintiffs' objectives are self-serving, they indeed are not the kind of objectives that FOIA was meant to further. However, the plaintiffs also seek the information in order to learn whether the United States government is adequately monitoring Haiti's compliance with its obligation not to persecute returnees and to learn whether our government is honest to the public about Haiti's treatment of returnees. They dispute the view expressed publicly by some government officials that Haiti is adhering to its promise not to punish returnees, and they seek information that will assist them in testing the accuracy of that information. We consider these to be matters of great public interest significant enough to outweigh the privacy interests of the Haitian returnees.

The government concedes that there exists "a legitimate public interest in the safe relocation of Haitians." Initial Brief for the Government Agencies at 41. It argues, however, that the disclosure of the identities of the Haitian returnees will not serve that public interest in any way. Obviously, the disclosure of the Haitians' names and addresses, in and of itself, will not tell the plaintiffs anything about Haiti's treatment of its returnees or the U.S. government's honesty about the matter. But the identifying information will give the plaintiffs a means to obtain "public interest" information in that they can then locate the Haitian returnees and inquire about how they were treated after they were returned to Haiti.

The plaintiffs avoid admitting that they intend to use the information by contacting the Haitians directly, but that is the clear implication, and it is one that we do not take lightly. The implication that disclosure will result in direct contacts with the returned Haitians is the factor that makes the invasion of privacy in this case more than "de minimis". But that factor also convinces us that the information sought here is imbued with a significant public interest because it is a means for the public to see what its government is up to regarding the relocation of Haitians and what it is telling the public on the matter.

We have considered the government's argument that requiring disclosure in this case would be inconsistent with the Supreme Court's most recent case on FOIA's privacy exemptions, *United States Dept. of Justice* v. *Reporters Committee*, —— U.S. ——, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989). In that case the Supreme Court addressed whether FOIA Exemption 7(C) precluded disclosure of a private citizen's "rap sheet" in the possession of the FBI.[2] The requesters argued that the information was of public interest in that the subject of the rap sheet was an officer of a corporation that allegedly had obtained a number of defense contracts as a result of improper

[2] Exemption 7(C) excludes from the mandatory disclosure requirement records or information compiled for law enforcement purposes, "but only to the extent that the production of such [materials] could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C) (1988). The Court did not address the application of Exemption 6. Although the two exemptions involve somewhat different standards, *see Reporters Committee*, 109 S.Ct. at 1473, many of the general principles applicable to the two exemptions are the same. *See id.* at 1479.

dealings with a corrupt Congressman. *Id.* at 1482. The Supreme Court rejected this argument, reasoning that disclosure of the rap sheet would not disclose anything about the actions of the Congressman, the Department of Defense, or any other government agency or official, and, accordingly, the invasion of privacy that would result from disclosure was not justified by a public interest cognizable under FOIA. The Court emphasized that the purpose of FOIA is not the disclosure of information about private individuals but, rather, information about the government, its agencies, and its agents acting in the line of duty. *Id.*

Our holding here is not inconsistent with *Reporters Committee*. The Supreme Court in *Reporters Committee* refused to disclose certain information about an individual because the information did not shed any light on the government or a government agent. In other words, the release of the information would not serve a public interest as that term is used in the FOIA context. The Court stated that

> [FOIA's] purpose . . . is not fostered by disclosure of information about private citizens that is accumulated in various governmental files *but that reveals little or nothing about an agency's own conduct*. In this case—and presumably in the typical case in which one private citizen is seeking information about another—the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of any Government agency or official.

Id. at 1481 (emphasis added).

Nothing in *Reporters Committee* precludes the possibility that a FOIA request about a private individual may involve legitimate public interests; that case only explains that in the typical case where an individual seeks information about another individual, legitimate FOIA purposes are not involved. We consider this to be an atypical case. The plaintiffs herein seek information about individuals that will help them to scrutitinize what our government is doing and saying regarding Haitians who unsuccessfully attempt to flee to this country. This is an important public interest—the kind which Congress had in mind in framing FOIA. As the Court stated in *Reporters Committee*, "[o]fficial information that sheds light on an agency's performance of its statutory duties falls squarely within [FOIA's] statutory purpose." *Id.*

The government also relies heavily on the D.C. Circuit's decisions in *Federal Labor Relations Auth. v. United States Dept. of the Treas., Financial Management Serv.*, 884 F.2d 1446 (D.C.Cir.1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 863, 107 L.Ed.2d 947, 948 (1990), and *National Assn. of Retired Federal Employees v. Horner*, 879 F.2d 873 (D.C. Cir. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 1805, 108 L.Ed.2d 936 (1990). Both cases involved FOIA requests for names and addresses of private individuals and whether Exemption 6 precluded disclosure. In both instances the D.C. Circuit concluded that disclosure would cause privacy invasions that were not justified by legitimate public interest in the information. In *Horner*, the court concluded that the information sought was not of any public interest, 879 F.2d at 879, and in *FLRA* the court found the public interest to be only slightly higher than in *Horner*. 884 F.2d at 1452-53. These cases are distinguishable

from the instant case in that here the plaintiffs have identified a very strong public interest in the requested information that is sufficient to outweigh the privacy interest that will be infringed by disclosure.

After careful consideration, then, we conclude that the government has not demonstrated that disclosure of the Haitians' names and addresses "would constitute a clearly unwarranted invasion of personal privacy." It is a close question, but we are convinced that the invasion of privacy that will likely result from disclosure is outweighed by the strong public interest in the information. We have a duty to construe FOIA's disclosure provisions broadly and its exemptions narrowly, and to impose on the government the burden of proving that an exemption applies. Applying these standards, we conclude that the government has not demonstrated that the redacted information in exempt from disclosure by Exemption 6. Accordingly, we affirm the district court's ruling that the State Department must disclose the redacted information.

2. Waiver of FOIA Exemptions

After the district court ruled on March 2, 1989, that the redacted information was not protected by Exemption 6 of FOIA, the State Department filed a motion to alter or amend the judgment, arguing for the first time since this action was filed in June 1987 that the redacted information is also exempt from disclosure by Exemptions 1, 7(C), and 7(D) of FOIA.[3] The district court declined to rule on the merits of these claims, finding that the government waived them by not asserting them in its answer or at any time prior to the district court's judgment. *Ray*, 725 F.Supp. at 505-06.

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[3] *See* footnote 1.

The government now argues that the district court erred in finding that it waived these exemptions and asks this court to reach the merits of these issues. The government explains that its failure to timely raise the additional exemption claims was the result of pure mistake and that this court should decide these issues because they involve grave concerns of national security and foreign policy. The government relies primarily on *Jordan v. United States Dept. of Justice*, 591 F.2d 753 (D.C.Cir.1978) (en banc), where the D.C. Circuit stated that an appellate court has the discretion to reach the merits of a FOIA exemption not raised before the district court if the failure to raise it was due to pure mistake, the value of the material is very high, and it appears highly likely that the exemption does apply. *Id.* at 780.

We agree that courts have some discretion to excuse untimeliness where justice so requires, but we do not believe that this is such a case. We find it difficult to believe that the redacted information implicates compelling national security concerns in light of the government's failure *for almost two full years* to bring these concerns to the attention of the court or the plaintiffs. We find no circumstances in this case that warrant not applying the fundamental rule that a defendant must "allege all affirmative defenses in a responsive pleading and the failure to do so will normally result in waiver." *Chilivis v. Securities and Exchange Comm'n*, 673 F.2d 1205, 1208 (11th Cir. 1982). Thus, we affirm the district court's ruling that the State Department waived its Exemption 1, 7(C), and 7(D) arguments and, accordingly, we need not reach the merits of those claims. *See also Senate of Puerto Rico v. United States Dept. of Justice*, 823 F.2d 574, 580 (D.C.Cir.1987) and cases cited therein

(explaining that courts should not allow government to raise FOIA exemptions in a piecemeal fashion).

B. *The Plaintiffs' Cross-Appeal*

1. Class Certification

The plaintiffs argue on cross-appeal that the district court abused its discretion by refusing to certify a class pursuant to Federal Rule of Civil Procedure 23. The plaintiffs proposed to define their class as follows: "all black Haitian citizens presently under exclusion or deportation proceedings, or under final orders of exclusion or deportation, or who will be under such proceedings or orders in time to join this class, and who have or who will present a claim for political asylum before the immigration judges." Second Amended Complaint at 3.

Federal Rule of Civil Procedure 23(a) sets out the following requirements for the certification of a class: (1) numerousity; (2) commonality; (3) typicality; and (4) adequacy of representation. Considerable discretion is afforded the district court on questions regarding class certification. We review the district court's decision only to determine whether it has abused its discretion. *See Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir.), *cert. denied*, 479 U.S. 883, 107 S.Ct. 274, 93 L.Ed.2d 250 (1986); *Griffin v. Carlin*, 755 F.2d 1516, 1531 (11th Cir.1985).

We find no abuse of discretion in this case. The plaintiffs do not make clear for what purpose they want a class certified—that is, whether they seek certification for their FOIA claim or their claim for injunctive relief. Certifying a class for the plaintiffs' FOIA claims in this case would serve no purpose be-

cause information released to a plaintiff under FOIA is equally available to any person who requests it. *See National Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149, 95 S.Ct. 1504, 1515, 44 L.Ed.2d 29 (1975).

Apparently the plaintiffs seek class certification for purposes of their request for an injunction against their exclusion and deportation proceedings. We note that the named plaintiff who seeks to represent the class, Michael Ray, does not appear to be an adequate representative in that he has not alleged that he is a Haitian citizen who is facing deportation or exclusion proceedings or who is seeking political asylum in the United States. He is an attorney who represents Haitians facing action by the INS. In any event, because we affirm the district court's denial of the plaintiffs' request for an injunction, the question of whether a class should be certified for that purpose is mooted.

2. Adequacy of FOIA Searches

The plaintiffs next argue that the district court erred in ruling that neither the INS nor the State Department improperly withheld documents from them. The adequacy of an agency's search for documents requested under FOIA is judged by a reasonableness standard. *Miller v. United States Dept. of State*, 779 F.2d 1378, 1383 (8th Cir.1985). Under this standard, the agency need not show that its search was exhaustive. Rather, " 'the agency must show beyond material doubt . . . that it has conducted a search reasonably calculated to uncover all relevant documents.' " *Id.* (quoting *Weisberg v. United States Dept. of Justice*, 705 F.2d 1344, 1351 (D.C.Cir. 1983)). The government agency may meet this burden by producing affidavits of responsible officials "so long as the affidavits are relatively detailed, nonconclusory, and submitted in good faith." *Miller*, 779 F.2d at 1383 (citation omitted). If the government agency meets its burden of proving that its search was reasonable, then the burden shifts to the requester to rebut the agency's evidence by showing that the search was not reasonable or was not conducted in good faith. *Id.*

We first address the adequacy of the State Department's search. As stated above, the district court ruled that the State Department complied with FOIA by releasing the 25 documents, pending its production of the redacted information. The plaintiffs claim that the State Department should have been required to produce more information. Specifically, they rely on a State Department report submitted to the district court entitled "Country Reports on Human Rights Practices for 1985," where reference is made to interviews of 582 Haitian returnees regarding their treatment after returning to Haiti. The plaintiffs complain that the documents turned over by the State Department provide information about only 395 such interviews and insist that there must exist documentation on the other 187 interviews.

The State Department submitted the affidavit of Frank Machak, Chief of the State Department's Information Access and Services Division. He explained that in response to Ray's request for information relating to interviews conducted of Haitian returnees by U.S. officials, the State Department searched the records of the Department's Office of Visa Services, the Bureau of Refugee Programs, and the Bureau of Human Rights and Humanitarian Affairs, and found no relevant records. However, responsive documents

were found in a search of the Central Foreign Policy Records. That is the source of the 25 documents provided to the plaintiffs. Mr. Machak further explained that regarding Ray's request for the names of 600 Haitian returnees the State Department searched the same offices, as well as the Bureau of Inter-American Affairs. No relevant documents were found. See Record, Vol. II, Exhibit L, Affidavit of Frank Machak.

We are satisfied that the State Department conducted a search reasonably calculated to uncover all requested materials. As explained above, FOIA does not require an agency to exhaust all files which conceivably could contain relevant information. The standard is one of reasonableness, and, based on the affidavits provided by the State Department, we conclude that that standard is met here. The plaintiffs' emphasis of a particular reference to 582 interviews, while they received information regarding only 384 interviews, is not enough to rebut the government's showing of an adequate search. In a similar context, the Eighth Circuit has noted that

> [t]he fact that a document once existed does not mean that it now exists; nor does the fact that an agency created a document necessarily imply that the agency has retained it. Thus, the [agency] is not required by [FOIA] to account for documents which the requester has in some way identified if it has made a diligent search for those documents in the places in which they might be expected to be found; it is not necessary "to create a document that does not exist in order to satisfy a [FOIA] request."

Miller, 779 F.2d at 1385 (quoting *Yeager v. Drug Enforcement Administration*, 678 F.2d 315, 321 (D.C.Cir.1982)).

Here, we have evidence of a diligent search that uncovered a good portion of what the requesters sought. The plaintiffs have not convinced us that the State Department did not make a reasonable attempt to find the documentation of the other interviews; for that matter, they have not convinced us that documentation was even made of each individual interview. We hold that the State Department complied with the requirements of FOIA in producing the 25 documents to the plaintiffs, subject, of course, to our affirmance of the district court's order that it supply the redacted information.[4]

The plaintiffs did not present argument in their appellate brief regarding the adequacy of the INS' search. Nor did they submit argument regarding the dismissal of their FOIA claim against the EOIR on the ground that no FOIA request was ever made to the EOIR. It is the government's impression that the plaintiffs have abandoned their claims against the INS and the EOIR. *See* Initial Brief for the Government Agencies at 7 n.2. The plaintiffs do, however,

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[4] The State Department points out that the reason for the discrepancy in the number of interviews may be that it reasonably construed the plaintiffs' requests to require production of documents for only approximately the first half of 1985, and the reference in the State Department report to 582 interviews covered the first nine months of 1985. The State Department states that it will construe the plaintiffs' brief in this case as a new FOIA request for any additional documents covering the interviews mentioned in the 1985 Country Reports. *See* Initial Brief for the Government Agencies at 26-27 n. 11. Thus, it appears that the plaintiffs can and will receive the information they desire. Despite that, we rule that the State Department's conduct in this case complied with FOIA because we are convinced that it performed a search that was reasonably calculated to locate the requested documents.

appear to appeal the district court's rulings on these issues because in their appellate brief they request this court to reverse the district court's grant of summary judgment to the INS and the EOIR. *See* Brief of Appellees-Cross Appellants at 32. Thus, we address these issues.

We have reviewed the record and are satisfied that the district court was correct in granting summary judgment to the INS and the EOIR. A plaintiff in a FOIA suit must show that an agency improperly withheld agency records. *Kissinger v. Reporters Committee*, 445 U.S. 136, 150, 100 S.Ct. 960, 968, 63 L.Ed.2d 267 (1980). Clearly, if a FOIA claim has not been made to an agency, that agency cannot be said to have improperly withheld documents. The plaintiffs admit that they did not submit a FOIA request to the EOIR. Brief of Appellees and Response of Cross-Appellants at 35. Thus, the claim against that agency was properly dismissed.

Our review also convinces us that the district court correctly ruled that the INS' search was reasonable. In response to the plaintiffs' requests, the INS stated that it did not conduct investigatory trips to Haiti and thus did not have reports of such trips. The INS contacted the person quoted in the newspaper article regarding a list of 600 Haitian returnees; he stated that he was misquoted in the article and did not have such a list. *See* Record, Vol. I, Government Exhibits F, G, H. We are satisfied that the INS conducted a reasonable search, and the plaintiffs have not put forth specific evidence to the contrary. Thus, there exists no genuine issue of material fact as to the adequacy of the INS' search.

The district court's grant of summary judgment to the INS and the EOIR is affirmed.

3. Injunctive Relief

We next address the plaintiffs' claim that the district court abused its discretion in failing to grant injunctive relief from their deportation and exclusion proceedings. The plaintiffs claim that until they receive the information they requested from the INS and the State Department they are unable adequately to defend themselves in their political asylum hearings before the EOIR. Thus, they requested the district court to "enjoin the final deportation and exclusion hearings of the members of the plaintiff class until such time as defendants have provided the FOIA requested information and for a period of at least six (6) months thereafter, so plaintiffs can study, analyze and verify defendants' reports as to what happens to returnees to Haiti." Second Amended Complaint at 14. The district court refused to grant an injunction, noting that it had "no authority to enjoin [the plaintiffs' INS deportation proceedings] under the FOIA or the Administrative Procedure Act, Title 5 U.S.C. sec. 704-706." *Ray*, 725 F.Supp. at 505 n. 3.

We are not convinced by the plaintiffs' argument that the district court's ruling in this regard was an abuse of discretion. The remedies that courts are authorized to grant in FOIA cases are expressly enumerated in FOIA, and they do not include the issuance of an injunction against related agency action. Under FOIA, the district court may: (1) enjoin an agency's withholding of documents and order production of relevant records where it has been found that information is being improperly withheld, 5 U.S.C. § 552(a)(4)(B) (1988); (2) assess against the United States attorney fees and other litigation expenses in cases where the plaintiff prevailed, 5 U.S.C. § 552(a)(4)(E) (1988); (3) dis-

cipline an agency official guilty of arbitrary and capricious action, 5 U.S.C. § 552(a)(4)(F) (1988), and (4) use its contempt power to punish an agency official for disobeying a disclosure order, 5 U.S.C. § 552(a)(4)(G) (1988). FOIA does not expressly provide the district courts with jurisdiction to enjoin agency proceedings that may be related to the subject matter of a plaintiff's FOIA request, and we are aware of no authority that has inferred such a power.

The plaintiffs also argue that the district court had authority to enjoin INS proceedings under the Administrative Procedure Act and cite us to 5 U.S.C. §§ 704 & 706 (1988). Neither of those provisions authorizes the injunctive relief that the plaintiffs seek here. Those provisions deal with final agency action and agency action made reviewable by statute.

As the defendants point out, in some limited circumstances federal courts have allowed suits directly attacking the processing of aliens notwithstanding the exhaustion requirements of 8 U.S.C. § 1105a(c) and notwithstanding the absence of a final administrative order. *See, e.g., Jean v. Nelson*, 727 F.2d 957, 979-81 (11th Cir.) (judicial intervention allowed prior to final agency decision in order to enjoin widespread practice of denying claimants' notice of their right to present asylum claim to particular agency), *cert. denied*, 469 U.S. 1071, 105 S.Ct. 563, 83 L.Ed.2d 504 (1984); *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1033 (5th Cir.1982) (claims of "a pattern and practice by immigration officials to violate the constitutional rights of a class of aliens . . . constitute wrongs which are independently cognizable in the district court under its federal question jurisdiction" (footnote omitted)).

Those cases do not support judicial intervention in this case. In *Smith* and *Jean*, the court authorized judicial review of INS proceedings prior to exhaustion because of the unique circumstance that the plaintiffs were claiming widespread, systematic wrongs in their exclusion proceedings. *See Jean*, 727 F.2d at 980; *Smith*, 676 F.2d at 1033. Further, in those cases, by delaying the assertion of their claims until after they exhausted agency remedies the plaintiffs, under their particular circumstances, would have completely foregone the opportunity to assert their claims. *See Jean*, 727 F.2d at 980; *Smith*, 676 F.2d at 1035.

That is not the case here. The plaintiffs do not allege that they are being subjected to broadly applied procedures in their exclusion proceedings that somehow render those proceedings illegal. Nor do they claim that if they pursue their administrative remedies they will have lost the opportunity to present their evidence that they would face persecution if returned to Haiti. The INS provides them with adequate opportunities to rebut evidence that they will not be subject to ill treatment. *See* 8 C.F.R. § 208.8(d) (1989). And, if they acquire evidence after their proceedings that they believe would have helped their case, there are means by which they can cause their case to be reopened for the consideration of such evidence. *See* 8 C.F.R. § 3.2 (1989).

In light of the avenues available to the plaintiffs, and in light of the important policies underlying the exhaustion doctrine, *see Smith*, 676 F.2d at 1034, we believe that the district court acted properly in refraining from entering an injunctive order delaying the plaintiffs' deportation and exclusion proceedings pending the government's compliance with their

FOIA requests. The district court's denial of the plaintiffs' request for an injunction is thus affirmed.

III. CONCLUSION

We affirm the district court's decision in all respects. Accordingly, the State Department is ordered to release, within fifteen days of entry of this order, the information that it redacted from 17 of the 25 documents provided to the plaintiffs pursuant to FOIA. All remaining claims against the State Department, the INS, and the EOIR are dismissed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

Case No. 86-2430-CIV-HASTINGS

MICHAEL RAY, ESQ., ETC., ET AL., PLAINTIFFS

v.

UNITED STATES DEPT. OF JUSTICE, ET AL.,
DEFENDANTS

[Filed Mar. 3, 1989]

MEMORANDUM ORDER ON PENDING MOTIONS

THIS CAUSE was heard by the Court on various pending motions filed by the parties, and the Court hereby enters this Order pursuant to its rulings in open court on March 1, 1989.

I

This case is brought pursuant to the Freedom of Information Act, 5 U.S.C. sec. 552 (FOIA), under which plaintiffs seek from the Immigration and Naturalization Service (INS), the Executive Office for Immigration Review (EOIR) and the United States Department of State (State Dept.) disclosure of (1) an alleged list of 600 Haitians who had been returned to Haiti and not mistreated after their arrival; and (2) investigative trip reports made by INS investigators who have visited Haiti.

Several searches conducted by each agency yielded responses that no records were found which fit the FOIA request made by plaintiffs. Subsequently, the State Dept. located and turned over to the plaintiffs twenty-five (25) responsive documents. Of these, seventeen documents were redacted to exclude the names of the Haitian individuals contained therein. The State Dept. claimed that release of the excised information could result in an invasion of privacy and, accordingly, asserted an exemption under the Freedom of Information Act ("FOIA"), 5 USC sec. 552(b)(6).[1] At all times, however, each agency has maintained that there exists no list of 600 Haitians returned to Haiti.

II

There are two issues confronting the Court. The first issue concerns disclosure requirements when an agency's asserts that its search uncovers no documents which satisfy an FOIA request. The second issue focuses on disclosure requirements when an agency claims that information excised from the released documents is exempt under the invasion of privacy exemption of sec. 552(b)(6).

A. *Documents Claimed Not to Exist*

The underlying principle in FOIA cases is that the requestor must show that an agency improperly withheld records. *Kissinger v. Reporter's Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980). With respect to records that are claimed not to exist,

[1] 5 U.S.C. sec. 552(b)(6) provides an exemption from disclosure for matters that are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

affidavits are permissible and "possibly the best method of verification." *Stephenson v. IRS*, 629 F.2d 1140, 1145 (1th Cir. 1980). An affidavit satisfies the "good faith" requirements of adequacy and completeness when it specifically documents the scope and methods undertaken for search and sets out the basis for the withholding of information. *See Freidman v. F.B.I.*, 605 F.Supp. 306, 316 (N.D.Ga. 1981). Once the agency demonstrates that its search was reasonable, the burden shifts to the requestor to rebut that evidence. *Miller v. U.S. Dept. of State*, 779 F.2d 1378, 1383 (8th Cir. 1985).

In this instance, the INS has responded that it did not conduct investigatory trips to Haiti nor have, in its possession, investigative reports. It has also maintained, by its answer, that the list of six hundred Haitians does not exists. The record indicates that there was a proper and adequate search, as demonstrated by the affidavits of the FOIA personnel. The record fails to disclose that any documents have been improperly withheld o[r] that they, indeed, exist. On the record, that principle has not been rebutted by the plaintiffs. In addition, the record indicates there have been no requests directed to EOIR, and, therefore, there is no issue before the Court in connection with that party.

B. *Documents Edited & Released by the State Department*

Where a FOIA request triggers a claim of exemption under the Act, the burden is on the government agency to demonstrate the basis for nondisclosure. Thus, contrary to the agency's assertion, a justiciable issue remains to be decided, and that is the propriety of the State Dept's claim of exemption under

sec. 552(b)(6), because "the District Court must do something more to assure itself of the factual basis and bona fides of the agency's claim of exemption than rely solely upon an affidavit." *Stephenson v. IRS*, 629 F.2d 1140 (5th Cir. 1980).

There is a presumption, under the FOIA, that documents held by a government agency are subject to disclosure. *Currie v. IRS*, 704 F.2d 523, 530 (11th Cir. 1983). An agency cannot withhold material based on conclusory allegations of possible harm; it must show by specific, detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA. *See Mead Data Central, Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). In determining whether the disclosure constitutes a "clearly unwaranted invasion of personal privacy,[2] the Court must employ a balancing test, weighing an individual's right of privacy against the public right to disclosure of government information. *Cochran v. United States*, 770 F.2d 949, 955 (11th Cir. 1985).

The degree of the invasion of privacy considers the potential harm to the individual from disclosure of the information. The critical aspect is that an invasion be actual rather than just theoretical; it must be more than a mere possibility. *Dept. of Air Force v. Rose*, 425 U.S. 352, 360 n.19 (1976). Moreover, an agency's promise of confidentiality to the submitter of information was found insufficient to defend against disclosure. *Robles v. E.P.A.*, 484 F.2d 842, 846 (4th Cir. 1973).

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[2] Under sec. 552(b)(6), the requested files must be "personnel", "medical", or "similar files". Because plaintiffs did not challenge this classification, the Court assumes that the names of returned Haitians are sufficiently personal in nature to satisfy the "similar file" requirement.

As to the public interest involved in this case, this country's immigration policy supports a finding that the public has a legitimate interest in the safe relocation of returned Haitians.

Any invasion of privacy from the mere act of disclosure of names and addresses would be de minimis and little more than speculation. The promise of confidentiality by the State Dept. is only one factor to be considered and, in this case, is not determinative of the outcome. Thus, weighing the public interest against the private interest, the balance tilts in favor of disclosure of the names because any intrusion into the privacy of the Haitian nationals would be minimal.

III

For these reasons, it is hereby

ORDERED AND ADJUDGED that summary judgment is GRANTED in favor of INS and EOIR with respect to the FOIA information requests explained or shown to be non-existent. It is

FURTHER ORDERED AND ADJUDGED that the State Department is required, within fifteen days from this Court's ruling in open court, to supply the redacted information contained in the seventeen documents. Final judgment as to the State Department is withheld until this time period has expired and a showing has been made to the Court that the names have been furnished to the plaintiffs, and, if they have not, then the Court will take further appropriate action forthwith.[3]

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[3] The remaining pending motions in this case are DENIED without prejudice. Plaintiffs' request for this Court to enjoin INS deportation proceedings is also DENIED. This Court has no authority to enjoin those proceedings under the FOIA or the Administrative Procedure Act, Title 5 U.S.C. sec. 704-706.

DONE AND ORDERED at Miami, FL, this 3rd day of March 1989.

/s/ David W. Dyer
DAVID W. DYER
Senior United States
Circuit Judge,
Sitting By Designation

Copies to:
M. Ray, Esq.
L. Summers, AUSA

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 86-2430-Civ-HASTINGS

MICHAEL D. RAY, ESQUIRE, individually and as attorney for certain Haitian political asylum applicants, IVES AUDATE, JEAN HEVIL LOISEAU, and YVON NICHOLAS, on behalf of themselves and all others similarly situated, PLAINTIFFS

vs.

UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION and NATURALIZATION SERVICE and EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OFFICE OF THE IMMIGRATION JUDGE, and the STATE DEPARTMENT, DEFENDANTS

ORDER COMPELLING STATE DEP'T TO
RELEASE UNREDACTED DOCUMENTS
WITHIN TEN DAYS

THIS CAUSE having come before the Court, and the Court having heard argument of counsel on April 12, 1989, and considered the same, it is hereby

ORDERED AND ADJUDGED that plaintiffs' motion for *pro hac vice* appearance of Neil D. Kolner, Esq. is GRANTED and it is

FURTHER ORDERED AND ADJUDGED that defendants' motion to alter or amend is DENIED. After weighing the public interest in disclosure against the claim of exemption pursuant to 5 U.S.C. 552(b)(6), this court ordered the STATE DEPART-

MENT on March 2, 1989 to produce to plaintiffs, no later than March 16, 1989 as originally requested in plaintiff's June 15, 1985 Freedom of Information Act Request, unredacted copies of all documents in defendant's possession which satisfy plaintiff's request. Defendants did not comply but instead raised new arguments which the Court finds are wholly unfounded. Rather than exhibit due diligence the government has been neglectful in this matter by failing to raise ~~these~~ exemptions at the outset of this litigation. Consequently, the government has waived entitlement to those claims by invoking these belated exemptions after this Court's order requiring disclosure of the redacted information. *See, e.g., Senate of the Commonwealth of Puerto Rico v. Dept. of Justice*, 823 F.2d 574, 580 (D.C. Cir. 1987); *Ryan v. Dept. of Justice*, 617 F.2d 781, 782 (D.C. Cir. 1980); *Jordan v. Dept. of Justice*, 591 F.2d 753 (D.C. Cir. 1978) (en banc); *Cotner v. U.S. Parole Comm.*, 747 F.2d 1016, 1018 (5th Cir. 1984); *Fendler v. Parole Comm.*, 774 F.2d 925, 978 (9th Cir. 1985); *American Broadcasting Co. v. U.S.I.A.*, 599 F. Supp. 765, 768 (D.D.C. 1984); *Donovan v. F.B.I.*, 633 F. Supp. 35 (S.D.N.Y. 1986). The government has failed to point to any set of facts that would make this an "exceptional" case such that the waiver doctrine should not apply. *See Jordan* at 780. Indeed, by its own admission at oral argument, the government agreed its motion contains nothing more than "new material." Thus, in its prior Order this Court did not overlook any basis in the record which would require a different conclusion. The government has only attempted to "play cat and mouse by withholding its most powerful canon until after the district court has decided the case and then springing it on surprised opponents and the judge." *Senate of*

the Commonwealth, 823 F.2d at 580, *quoting Grumann Aircraft Engineering Corp. v. Renegotiation Board*, 482 F.2d 710, 722 (D.C. Cir. 1973). For this reason, it is therefore

FURTHER ORDERED AND ADJUDGED that the STATE DEPARTMENT shall release the unredacted documents to plaintiffs no later than ten (10) days from this Court's oral ruling on April 13, DONE AND ORDERED at Miami, Florida, this 1989.

/s/ David W. Dyer
DAVID W. DYER
Senior United States
Circuit Judge
Sitting By Designation

Copies: Counsel

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-5375

MICHAEL D. RAY, Individually and as attorney for certain Haitian national clients and IVES AUDATE, JEAN HEVIL LOISEAU and YVON NICHOLAS, PLAINTIFFS-APPELLEES, CROSS-APPELLANTS

versus

UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE and THE STATE DEPARTMENT, DEFENDANTS-APPELLANTS, CROSS-APPELLEES

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion August 17, 1990, 11 Cir., 1990, —— F.2d ——)

(October 12, 1990)

Before FAY and JOHNSON, Circuit Judges, and GIBSON *, Senior Judge.

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* Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no matter of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing en Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Peter Fay
United States Circuit Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

Case No. 86-2430-CIV-HASTINGS

MICHAEL RAY, ESQ., ETC., ET AL., PLAINTIFFS

vs.

UNITED STATES DEPT. OF JUSTICE, ET AL.,
DEFENDANTS

[Filed Mar. 3, 1989]

FINAL JUDGMENT

THIS CAUSE came before the Court for hearing on pending motions and the issues having been duly heard, in accordance with Federal Rules of Civil Procedure 54(b) and 58, and pursuant to this Court's Memorandum Order entered this date, it is hereby

ORDERED AND ADJUDGED that summary judgment is GRANTED in favor of the Immigration and Naturalization Service, and that this action is DISMISSED on the merits; and it is

FURTHER ORDERED AND ADJUDGED that summary judgment is GRANTED in favor of the

Executive Office of Immigration Review, and that this action is DISMISSED on the merits.

DONE AND ORDERED at Miami, FL, this 2nd day of March 1989.

/s/ David W. Dyer
DAVID W. DYER
Senior United States
Circuit Judge,
Sitting By Designation

Copies: Counsel

APPENDIX F

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C. 552, provides in relevant part:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public, information as follows:

* * * * *

(3) * * * [E]ach agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

* * * * *

(b) This section does not apply to matters that are—

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

* * * * *

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information * * * (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, [or] (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis * * *;

* * * * *

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

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